COURT OF APPEALS DIVISION II

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No. 53627-7-II

STATE OF WASHINGTON

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION TWO

JOEL ZELLMER,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Erik D. Price, Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

- 1. The court erred by dismissing Mr. Zellmer's Public Records Act claim on Request ID 112075 (July 3, 2016 request).
- 2. The court erred by dismissing Mr. Zellmer's Public Records Act claim on Request ID 113598 (October 4, 2016 request).
- 3. The court erred by dismissing Mr. Zellmer's Public Records Act claim on Request ID 115355 (February 4, 2017 request).
- 4. The court abused its discretion by denying Zellmer's motion for reconsideration.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- 1. Whether L&I performed an adequate search for records to Request ID 112075. (Assignment 1).
- 2. Whether equitable tolling applies to Request ID 112075. (Assignment 1).
- 3. Whether L&I performed an adequate search for records to Request ID 113598. (Assignment 2).
- 4. Whether L&I performed an adequate search for records to Request ID 115355. (Assignment 3).
- 5. Whether records produced by L&I to a separate fourth request (Request ID 115317) are responsive to Mr. Zellmer's earlier requests. (Assignment 1, 2, 3).
 - 6. Whether records produced by L&I in support of its

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summary judgment motion are responsive to Mr. Zellmer's earlier requests. (Assignment 1, 2, 3).

7. Whether the trial court abused its discretion by denying Mr. Zellmer's motion for reconsideration.

C. STATEMENT OF THE CASE

1. Substantive Facts

Joel Zellmer has previously filed injured worker compensation claims with the Department of Labor and Industries ("L&I") for job-related injuries sustained between 1999 and 2004. Three of his claim numbers are N767257 (skin condition from toxic chemical exposure), Y154479 (lung condition from toxic chemical exposure), and Y480253 (wrist damage from heavy machinery usage). CP 3, 155. As part of L&I's investigation of his claims, an examination was performed by a licensed medical provider in each of his three claims. CP 3. These examinations were initially thought to have been termed "independent medical examinations" or "IMES" by Mr. Zellmer, but turned out to be for examinations of records, or a "record review." CP 3, 77 (¶ 13), 422-23.

In early to mid 2010, Lori Rigney, a medical treatment adjudicator with L&I in the Health Services Analysis division and who processes various types of medical bills submitted by medical vendors, processed four bills received by four separate medical providers: doctors Steven Fey, H. Berryman Edwards, Alfred Blue, and Dennis Stumpp, under claim numbers N767257,

Y154479, and Y480253. CP 75-76, 183-87, 189. Separate payments for the examinations were made by L&I to each of the four medical providers. CP 3, 185-86.

Medical vendor bills received by I&I in industrial insurance claims are retained in the MIPS (medical information payment system) portion of the ORION (organized information online integrated document management) database, and can be accessed by a workers' compensation claim number or an internal control number assigned by I&I. CP 194-95. Those bills are not stored in the industrial insurance claim file. CP 193.

Various divisions within L&I have direct access to the ORION database where medical bills are stored. Including the Claims Administration & Training division, MIPS division, and Health Services Analysis division. CP 190-91. All staff in L&I's public records unit also have direct access to the ORION database, and are trained in and have a working knowledge of that database. CP 212.

L&I also maintains MIPS records and reports in an electronic system called Enterprise Output Solution ("EOS"), which shows payments made to medical vendors by the claim number assigned to each industrially injured worker. CP 2, 117-18.

After L&I receives a public record request, a Forms and Records Analyst is assigned to respond to the request. A level 3 analyst requires more training than a level 1. CP 207. The analyst may route the request to a point-of-contact (POC) in

another division within L&I who might have access to or possession of the requested records. CP 208.

I&I's public records unit analysts are trained to know which point-of-contact to route a request to based on the function of each division. I&I also has a point-of-contact list which can be used by the analyst. CP 209-10.

When searching for records, analysts are trained to follow obvious leads as they are uncovered, and to search additional locations in order to locate records. CP 210, 238, 262-63.

Before I&I closes a request, the request may be subjected to a second review which, among other things, is intended to catch responsive records that were missed by the analyst. CP 210. A second review is typically performed by a co-worker or a supervisor. CP 271.

L&I creates a tracking sheet for each request which contains information related to L&I's response, including requestor and request details, actions taken, and point-of-contact routing information. See e.g., CP 146-155. Staff involved in responding to the request are designated on the tracking sheet by alphanumeric codes. CP 290.

Mr. Zellmer became aware of the four doctors and the amounts paid to each by emails he received through an earlier public record request to L&I. CP 103, 106-08. Piecing the information together from the emails and other sources, Mr.

Zellmer made his first request to L&I for the billing and related payment records (Request ID 112075). When that request failed to turn up the billing and payment records, he made a second request (Request ID 113598), then a third request (Request ID 115355). CP 3, 103. Details of these three requests at issue here are described individually below.

Taking a shot-in-the-dark, Mr. Zellmer made a fourth request (Request ID 115317) after receiving a copy of L&I's record retention schedule. CP 110, 116-18. By that request, Zellmer finally obtained some MIPS payment records from L&I's EOS system. CP 111-15. The records reflect the four payments made to the four doctors in the very amounts that Zellmer had named and provided to L&I in his earlier requests. CP 49, 60, 103-04, 119-144 (MIPS payment records). Details of these later-produced responsive records are described below.

After suit was filed and in support of its summary judgment motion, L&I filed a declaration from Lori Rigney. CP 75-77. Attached to her declaration were the billing records of the four doctors sought by Mr. Zellmer in his earlier requests. CP 80-84 (Dr. Fey), 86-87 (Dr. Edwards), 89-91 (Dr. Stumpp), 93-94 (Dr. Blue). Details of these later-produced responsive records are described below.

(a) First Request, July 3, 2016 (Request ID 112075).

Mr. Zellmer made his first request to L&I dated July 3, 2016 seeking certain financial record-types of the billings and APPELLANT'S OPENING BRIEF--5

payments for the examinations performed by doctors Fey, Edwards, Blue, and Stumpp in his three claim numbers. He made his request using the following primary terms: billings, invoices, statements, warrants of payments, and orders of authorization.

CP 3, 49 (July 2016 request), 147, 232-33.

The request was assigned to Laurel Chastain, a Forms & Records Analyst 3. CP 146, 232, 290. Ms. Chastain routed the request to two other divisions, the Claims Administration and the MIPS divisions. CP 46, 146-47. Both divisions have direct access to the ORION database where the medical bills are stored. CP 190-91.

Neither division produced any records requested by Zellmer. CP 4, 47. I&I performed a second review then closed the request. CP 47, 146-147.

(b) Second Request, October 4, 2016 (Request ID 113598).

Zellmer's second request was dated October 4, 2016, and sought the same financial records related to the examinations performed by the four doctors in his three claim numbers. On this request, Zellmer additionally gave L&I the specific amounts paid to each doctor, including the "\$35,000.00" paid to Fey, the "\$3,850.00" paid to Edwards, the "\$5,400.00" paid to Blue, and the "\$4,200.00" paid to Stumpp. CP 4-5, 60 (October 2016 request), 149-52, 290.

The request was initially assigned to Michelle Williams, then reassigned to Mara Osborn, a Forms & Records Analyst 3. CP

257. Ms. Osborn routed the request to two other divisions, including the Claims Administration and the Health Services Analysis divisions. CP 56-57, 267. Both divisions have direct access to the ORION database where the medical bills are stored. CP 190-91.

Neither division produced any records requested by Zellmer. CP 5, 57. L&I performed a second review then closed the request. CP 57, 149-52.

(c) Third Request, February 4, 2017 (Request ID 115355).

Zellmer made his third request dated February 4, 2017 seeking the same records. On this request he gave L&I the date range of the billings, that is, "between November 1, 2009 thru April 30, 2010." CP 6, 41 (February 2017 request). The request was assigned to Donna Desch, a Forms & Records Analyst 1. CP 38, 154-55, 290.

Ms. Desch produced no records and closed the request the following day. CP 6-7, 39, 154-55.

(d) Later-Produced Responsive Records.

Zellmer made a fourth request to L&I. The request was dated February 5, 2017, was given a Request ID number of 115317, and was assigned to Ms. Chastain. CP 110-15. The request sought three categories of financial records, including an Annual Claimant History Profile, a Firm Statement of Awards, and Remittance Advices, to cover the period of 2007 through 2011 in Zellmer's three claim numbers. CP 7, 110. The three types of

financial statements from L&I's EOS system provide the records of payments made to medical vendors by the claim number assigned to the industrially injured worker. CP 2, 117-18.

L&I produced records to Mr. Zellmer's fourth request in all three record categories. The records show the \$3,850 payment to doctor Berryman Edwards in the N767257 claim, the \$4,200 payment to doctor Stumpp in the Y154479 claim, the \$35,700 payment to doctor Fey in the Y154479 claim, and the \$5,400 payment made to doctor Blue in the Y480253 claim. CP 119-144, 157-162.

The 19 pages of MIPS statements were responsive to Zellmer's earlier requests at issue where he sought billing and payment records of each of those four doctors in those three claim numbers. Compare CP 49 (July 2016 request), 60 (October 2016 request). The MIPS reports were located in the EOS system, where those payment records are typically stored. CP 114, 188-89.

After suit commenced, a declaration was submitted by Ms. Rigney to support L&I's motion for summary judgment. CP 75-78. Attached to her declaration as Exhibit A are the billing records (invoice, statements, etc.) for doctor Fey's bill for \$35,700 in the Y154479 claim. Attached as Exhibit B are the billing records (invoice, statement) for doctor Berryman Edwards bill for \$3,850 in the N767257 claim. Attached as Exhibit C are the billing records (invoice, statement, etc.) for doctor Stumpp's

bill for \$4,200 in the Y154479 claim. And attached as Exhibit D are the billing records (invoice, statement) for doctor Blue's bill for \$5,400 in the Y480253 claim. CP 79-94 (exhibits A-D).

Those 12 pages of original billing records were responsive to Zellmer's earlier requests at issue where he sought billing and payment records of each of those four doctors in those three claim numbers. Compare CP 49 (July 2016 request), 60 (October 2016 request). The records were located in the MIPS billing part of the ORION database, where those billing records are typically stored. CP 183-85, 188-89.

2. Procedural Facts

Mr. Zellmer filed suit against L&I in the Thurston County superior court on January 12, 2018 for violations of the Public Records Act related to Request IDs 112075, 113598, and 115355. CP 1-13. After service of process and appearance by L&I, L&I filed its Answer. CP 14-22.

L&I later moved to dismiss the case on August 3, 2018. CP 23-37. L&I submitted multiple declarations supporting its summary judgment motion. CP 38-102. Zellmer filed a brief in opposition, CP 287-303, with declarations in support. CP 103-175, 178-286.

A hearing was held on May 3, 2019 before the Honorable Erik Price. Judge Price granted I&I's motion for summary judgment as to all of Zellmer's claims and dismissed the case with prejudice. CP 438-39.

Zellmer timely moved the superior court to reconsider under CR 59(a) arguing that the court's decision was contrary to law based on the facts. CP 409-421, 422-437. After opposition by L&I, CP 440-451, Judge Price denied Zellmer's motion by a one page order. CP 452. Zellmer timely appealed to this Court. CP 453-57.

D. ARGUMENT

1. THE POLICY AND PURPOSE OF THE PUBLIC RECORDS ACT REQUIRES AN ADEQUATE SEARCH AND DISCLOSURE AND PRODUCTION OF REQUESTED PUBLIC RECORDS.

The Public Records Act (PRA), chapter 42.56 RCW, "is a strongly worded mandate for broad disclosure of public records." Hearst Corp. v. Hoppe, 90 Wn.2d 123, 127, 580 P.2d 246 (1978); RCW 42.56.030. The PRA's production requirement is broadly construed and its exemptions are narrowly construed to implement this purpose. RCW 42.56.030; Cowles Publ'g Co. v. Spokane Police Dep't, 139 Wn.2d 472, 476, 987 P.2d 620 (1999). Therefore, the PRA requires that every state and local agency produce any nonexempt public record upon request. RCW 42.56.070(1), .080.

Agency actions taken or challenged under the PRA is reviewed de novo. RCW 42.56.550(3). The application of a statute to a fact pattern is a question of law fully reviewable on appeal. Ameriquest Mortg. Co. v. Office of Attorney General of Wash., 177 Wn.2d 467, 478, 300 P.3d 799 (2013). The interpretation of case law is reviewed de novo. Id. Appellate

courts stand in the shoes of the trial court when reviewing declarations, memoranda of law, and other documentary evidence. Id.

Under the PRA, there is no official format required for making a record request. RCW 42.56.080(2) (2017) ("No official format is required for making a records request"). The standard, however, for a request for public records is that the request 'must identify with reasonable clarity those documents that are desired." Hangartner v. City of Seattle, 151 Wn.2d 439, 448, 90 P.3d 26 (2004) (reaffirming Wood v. Lowe, 102 Wn.App. 872, 10 P.3d 494 (2000) and Bonamy v. City of Seattle, 92 Wn.App. 405, 960 P.2d 447 (1998)). The standard is not "identify with exact clarity" or "with absolute precision"; the standard is one of reasonableness. Therefore, there is a presumption of flexibility afforded to the agency's interpretation of the request, provided that interpretation remains within the scope of the purposes of the PRA. Agencies are not afforded the right to demand descriptions of records with pin-point accuracy; in fact, they are statutorily commanded to err on the side of production and transparency. RCW 42.56.030 (2007) ("This chapter shall be liberally construed and its exemptions narrowly construed"); RCW 42.56.550(3) (2017) ("even though such examination may cause inconvenience or embarrassment"). In the same vein, agencies cannot exclude potentially responsive records simply because the requestor uses

a wrong or incorrect ancillary search term where the other specific primary descriptors adequately define the sought-after records. RCW 42.56.080(1) (2017) (request must be for "identifiable records").

This appeal centers on whether--under the PRA's long-standing policies of transparency and broad production of public records—a billing and payment record (which exists and is held by L&I in an easily searchable electronic database) from a particular doctor in a certain amount under a specific claim number, is responsive to Mr. Zellmer's public record request for the billing and payment records from that particular doctor in that certain amount under that specific claim number—notwithstanding the auxiliary error by Mr. Zellmer about the service the doctor actually performed for L&I?

L&I contends that no billing and payment records exist in its files because the service the four doctors performed were reviews of records instead of an "IME" (independent medical exam). The trial court record in this case reflects that the records do in fact exist, and that L&I did not perform any search for records, did not follow obvious leads, and plainly violated the PRA in response to Zellmer's requests.

a. L&I Did Not Perform Any Search For The Billing And Payment Records On Request ID 112075.

L&I contends it conducted an adequate search. CP 28. Contrary evidence however, conclusively shows that L&I staff

tasked with searching for records did <u>not</u> perform any search at all for the existing billing and payment records themselves; and instead, made an initial and final decision as to whether records existed or not based only upon an ancillary descriptor, that is, the service the doctors performed.

To determine whether or not L&I performed an adequate search under the PRA, this Court looks at the reasonableness of L&I's actions after receiving the request. To determine reasonableness, the focus is not on whether a document exists that is responsive to the request, but on the nature of the search process. Rufin v. City of Seattle, 199 Wn.App. 348, 357, 398 P.3d 1237 (2017), rev. denied, 189 Wn.2d 1034, 407 P.3d 1154 (2018).

When L&I received Zellmer's July 3, 2016 request, it was assigned to Laurel Chastain, a Forms and Records Analyst 3. Ms. Chastain testified she's had years of training and experience, and an extensive knowledge of the types of records held by L&I. CP 234-35. She testified she understood Zellmer's request as being for billing records, CP 232, and further understood each common term given including "billing", "invoices", "statement" and "warrant of payments". CP 232-34.

Ms. Chastain routed the request to two other divisions: Claims Administration & Training, and MIPS divisions. CP 147. Both divisions have direct access to the billing records of the four doctors from the ORION database. CP 190-91. Further, the MIPS division has direct access to MIPS payment reports of the payments made to each doctor from the EOS system. CP 114.

Testimony has plainly indicated that only the claim number and name of a doctor was needed to locate the billing and payment records. CP 188-89, 237-38. That was the very information given by Zellmer to L&I in his request. Compare CP 49 (July 2016 request).

I&I staff had reasonable clarity in Zellmer's request to understand which records he was seeking, that is, billing and payment records. CP 49 (requested "billing(s), invo[i]ces [and] statements by each of the providers", as well as orders of authorizations and warrants of payments). Moreover, I&I staff are trained to construe and interpret requests broadly. CP 222.

Remarkably though, L&I did not actually perform any search for the requested records which existed in their files. Instead, L&I stopped their "search" and closed the request after the most minimal amount of effort was expended: that is, determining that no IME's were performed in any of the claims. That became clear from Ms. Chastain's testimony:

- Q: So you just honed in on just IME only?
- A: Well, no. I honed in on IME and those doctors' names. And we didn't find an IME with those doctors.
- Q: Okay. And so and then you just stopped searching then?
- A: Yes.

CP 240.

Although L&I disingenuously argued they made a "search"
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for records, they in fact did not. The search methodology used by L&I was flawed from the start. As soon as they realized the doctors' services had not been IME's, their duty under the PRA was to follow obvious leads as they were uncovered. In fact they are trained to do just that. CP 210, 238.

Under the PRA, "agencies are required to make more than a perfunctory search and to follow obvious leads as they are uncovered." Neighborhood Alliance v. Spokane County, 172 Wn.2d 702, 720, 261 P.3d 119 (2011). I&I's so-called "search" was perfunctory at best. No actual search was made in either the MIPS part of ORION where the billing records were stored, nor in the EOS system where the payment records were stored. That was wholly inadequate under the PRA. Id. at 720 ("The search should not be limited to one or more places if there are additional sources for the information requested").

I&I's so-called "search", where it only pre-determined if any records existed based on whether IME's had been performed, was not a search for records. I&I was required to search for the billing records themselves in those locations were they were reasonably likely to be found. Alliance, 172 Wn.2d at 720.

Significantly, I&I did not meet their burden of proving an adequate search. RCW 42.56.550(1) (burden of proof on agency). The only declaration submitted for this first request was by Ms. Chastain. In it, she makes no attempt to describe

Instead, only indicating she routed the request and no records were located. A lack of material facts does not an adequate search make. Compare CP 45-47 with Alliance, 172 Wn.2d at 721 (an affidavit "should include the search terms and the type of search performed, and they should establish that all places likely to contain responsive records were searched").

Further, her deposition testimony shows L&I stopped its "search" after they assumed no billing records existed because of a database check that no "IME's" were performed in any of Zellmer's claims. CP 241-43. Ultimately, L&I made no search for the requested billing records (in the MIPS part of ORION) or the payment records (in EOS). Those were the only two places the records existed. No search does not equal an adequate search. Each person and each division that handled the request, including Darla Koflanovich who performed a second review and Ms. Chastain herself, had direct access and the ability to retrieve the records. See CP 146-47, 212 (all PRU staff have access to ORION), 248 (Chastain accessed ORION).

For L&I to convince Zellmer that no billing records of the four doctors existed, CP 54 (close-out letter), then turn around after being sued and produce those very records in support of its summary judgment motion, CP 79-94, and argue they are not responsive, is nothing short than a slap-in-the-face to both Zellmer and the PRA. The billing and payment records

produced by L&I after the fact were responsive to Zellmer's request and L&I violated the PRA by not producing them at the time of Zellmer's request. Summary judgment should have been denied.

i. Equitable Tolling Applies To Request ID 112075.

The statute of limitation to bring an action under the PRA is one year. RCW 42.56.550(6). The statute "normally begins to run on an agency's definitive, final response to a PRA request." Belenski v. Jefferson County, 186 Wn.2d 452, 457, 378 P.3d 176 (2016) (holding one-year limitation period applied to agency's final response that it had "no responsive records").

However, a statute of limitations may be tolled for equitable reasons when the circumstances show bad faith, deception, or false assurances by the defendant, and the exercise of due diligence by the claimant. Millay v. Cam, 135 Wn.2d 193, 205-06, 955 P.2d 791 (1998); Douchette v. Bethel Sch. Dist. No. 403, 117 Wn.2d 805, 812, 818 P.2d 1362 (1991). The doctrine of equitable tolling applies here.

There is no question that Zellmer has been diligent in his efforts to obtain the sought-after billing and payment records from day one. He made a first request on July 3, 2016 and resent that request on August 7th, giving L&I the types of records requested, the names of four doctors, and three claim numbers. L&I claimed to have no records. CP 3-4, 49, 54. Zellmer then made a second request a little over a month later

on October 4th, giving I&I the additional data of the specific amounts paid to each doctor. I&I again claimed to have no records. CP 4-5, 60, 72. Days later on February 4, 2017, he made a third request giving I&I the date range data. Again, no records. CP 6, 41, 43.

By a fourth request on February 5, 2017, he finally obtained some payment records from L&I's EOS system on November 27, 2017. CP 7-8, 111, 114. Upon receipt of those records, realizing they were responsive to his earlier requests, he wasted no time drafting and finalizing a PRA complaint (dated December 16, 2017, CP 13), and having it filed with the clerk on January 12, 2018 after arranging for payment of the fee. CP 1.

At the time Zellmer made his first request, L&I possessed the responsive billing and payment records of each of the four doctors. CP 79-94, 119-144. Here, we have evidence that: (1) L&I unlawfully withheld the existence of those records, PAWS v. Univ. of Wash., 125 Wn.2d 243, 884 P.2d 592 (1994) (silent withholding of records is a violation of the act); (2) L&I deceptively told Zellmer that they searched their files and could find no records when in fact no search for the records actually took place, CP 54, 240, 248; (3) L&I falsely assured Zellmer that there were "no records responsive based on the information provided in the request", CP 54; and of (4) L&I's overall bad faith when it violated the PRA and refused to perform a search. The facts warranted an application of

equitable tolling by the trial court.

b. I&I Did Not Perform Any Search For The Billing And Payment Records On Request ID 113598.

Exactly like its response to Zellmer's first request, I&I staff tasked with locating records to his second request did <u>not</u> perform any search at all for the responsive billing and payment records.

The second request dated October 4, 2016, CP 60, was received by L&I, assigned to Ms. Williams, then later to Mara Osborn, a Forms and Records Analyst 3. CP 149-50, 290. Ms. Osborn had worked on hundreds of requests and was knowledgeable about L&I's records. CP 258-59. She understood the terms used in the request. CP 257-58.

Ms. Osborn admitted the claim number and name of a doctor was enough information needed to locate the records. CP 261-62. She further indicated she would follow obvious leads if a record could not be found in an expected location. CP 262-63.

She routed the request to the Claims Administration and the Health Services Analysis divisions. CP 56-57, 151-152. [Note: Health Services Analysis (second request) and MIPS division (first request) are one-in-the-same, see CP 189, and have the same POC - Terri Bergeson, "BTER235", CP 290]. Both divisions, like the first request, had direct access to the sought-after records. CP 190-91.

On this request, L&I staff performed only a perfunctory
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"search", determining only if any IME's were performed. That is not a search for the records. L&I was required under the PRA to search for the actual records in those locations where they were likely to be found: the MIPS part of ORION, and the EOS system.

Ms. Osborn's declaration, like Chastain's, does not include any facts relating to the type of search performed, nor which places were searched. Instead, only indicating that she routed the request and no records were located. CP 55-58. That lack of material facts defeats L&I's claim that it performed an adequate search. Compare CP 55-58 with Alliance, 172 Wn.2d at 721 (information affidavit should contain). See also CP 274 (admitting she couldn't "speak to how or why or a way that a program searched their records.").

L&I cannot dispute that they made no search for the billing and payment records in the MIPS part of ORION and in the EOS system. CP 272. And no search does not equal an adequate search. Each person and each division that handled the request, including Elissa Zyski who performed a second review and Ms. Osborn herself, had direct access and the ability to retrieve the records. CP 151-52, 212 (all PRU staff have access to ORION), 276.

Remarkably, besides the fact no search was performed, Ms. Osborn took no further action on Zellmer's request even after receiving clarification from Zellmer which she herself had requested. CP 66-67, 69, 149, 261, 268-71.

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On this record, L&I's summary judgment motion should have been denied. L&I refused to perform a search, withheld the existence of records, and failed to produce the requested records to Mr. Zellmer, all of which violated the PRA.

c. L&I Did Not Perform Any Search For The Billing And
Payment Records On Request ID 115355.

By the time Zellmer made his third request on February 4, 2017, he had already made two other requests to L&I's public records unit seeking the same billing and payment records. With this third request he gave the date range of the billing records. CP 41. Once received it was assigned to Donna Desch, a Forms and Records Analyst 1. CP 154, 290.

Ms. Desch claimed to have worked on "anywhere between 300 and 400 requests a month" since December 2011, and that she had an extensive knowledge in finding records. She testified she understood her duty to provide records, and that I&I could be liable for an underproduction of records. CP 284-85.

However, her response, which is most troubling, was to close the request the next day. CP 154. She made no search for the billing and payment records of the four doctors in the three claim numbers. Even if she had, she would have looked in the wrong location according to her testimony:

- Q: Okay. To locate billing and payment records in the ORION database, can you search by the name of a doctor?
- A: The billing does not fall into the ORION. It falls under LINIIS.

CP 283. That is in direct conflict with the testimony from Rigney and Chastain that medical billing records are stored in the MIPS part of ORION, and the MIPS payment records are stored in the EOS system. CP 183-85, 193, 194-95, 237, 245-46.

Even in this third attempt to obtain the sought-after records of billings and payments made to doctors Fey, Edwards, Blue, and Stumpp, L&I's response to Zellmer was to withhold the existence of records, perform no search, and refuse to produce requested records. Summary judgment should have been denied due to L&I's violations of the PRA.

d. The Records Plaintiff Requested Existed In L&I's Files At The Time Of His Three Requests.

Mr. Zellmer made three separate requests to L&I seeking the same records: the records of billings and payments made to four doctors who performed a service for L&I in three of his worker compensation claims. CP 49 (first request), 60 (second request), 41 (third request); and see CP 103, 106-08.

Mr. Zellmer plainly and clearly asked for billings, invoices, statements, warrants of payments, and authorization orders, gave L&I the four specific amounts paid to each doctor, the claim numbers, and the date range of when he thought the doctors had billed L&I.

At the time of his first, second, and third requests, L&I possessed the original billing records. CP 79-94. L&I also possessed the records of those payments made to each of the four

doctors. CP 119-144.

There is no question that those records related to Dr. Fey are responsive to Zellmer's requests. There is no dispute that those records related to Dr. Berryman Edwards are responsive to Zellmer's requests. There is no denying that those records related to Dr. Blue are responsive to Zellmer's requests. And there is no repudiating that those records related to Dr. Stumpp are responsive to Zellmer's requests. L&I had a mandatory duty under the PRA to search for, disclose, and produce those records. L&I's refusal to do so violated the PRA and makes Mr. Zellmer the prevailing party in this action. See Alliance, 172 Wn.2d at 726 (whether a party is "'prevailing' relates to the legal question of whether the records should have been disclosed on request.")(citation omitted). Here, because L&I possessed the requested billing and payment records at the time Zellmer made his requests, the records should have been promptly produced, RCW 42.56.080(2) (2017); thus, Mr. Zellmer is the prevailing party and is entitled to his costs and fees, as well as per diem penalties. RCW 42.56.550(4).

2. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED PLAINTIFF'S MOTION FOR RECONSIDERATION.

After the trial court dismissed Zellmer's claims upon L&I's motion for summary judgment, CP 438-39, Zellmer moved for reconsideration pursuant to CR 59(a). CP 409-21, 422-37. Judge Price denied Zellmer's motion by a one-page order. CP 452.

Although judicial review of agency actions taken or APPELLANT'S OPENING BRIEF--23

challenged under the PRA is de novo, see RCW 42.56.550(3), the proper standard of review of a denial of a motion for reconsideration is for abuse of discretion. O'Neill v. City of Shoreline, 183 Wn.App. 15, 21, 332 P.3d 1099 (2014).

"A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons." West v. Dep't of Licensing, 182 Wn.App. 500, 516, 331 P.3d 72 (2014). "A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; and it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." West, 182 Wn.App. at 516-17.

Here, the trial court improperly denied Zellmer's motion, and made several errors of law in doing so.

The court's first legal error was in deciding that Mr. Zellmer's Public Records Act requests should be narrowly construed—focusing solely on the fact that none of the four doctors performed an "IME"—so as to exclude all the other primary descriptors given by Zellmer. That decision thereby denied Zellmer "full public access to public records." RCW 42.56.100.

During the summary judgment hearing, the trial court attached significance to Mr. Zellmer's use of capital letters in

the potential search term "IME" (i.e., "Independent Medical Examination"). CP 49 (first request). It decided that the use of capitalization rendered it the primary search term; thus, the court excluded all other search terms given. CP 412.

Mr. Zellmer provided the court argument and evidence that it made a legal error based on the facts. CP 412-14, 422-23.

Given the evidentiary record before the trial court, the court should have reconsidered its earlier ruling and reversed. Instead, it refused to consider the PRA's mandate of broad disclosure of public records when it excluded the combination of primary search terms given by Zellmer, that is: (1) the types of records: billings, statements, invoices, warrants of payments, and authorization orders; (2) the names of doctors: Fey, Berryman Edwards, Blue, and Stumpp; (3) the amounts paid: \$35,700, \$3,850, \$5,400, and \$4,200; and (4) the claim numbers: N767257, Y154479, and Y480253. CP 49, 60.

Especially in light of the fact L&I possessed--in an easily searchable database which everyone who touched Mr. Zellmer's requests had access to--the billing and payment records of all four doctors, in those three claim numbers, in the exact amounts given by Zellmer.

It was a clear abuse of discretion for the court to subscribe to L&I's groundless claim that the records Zellmer requested did not exist because the billable service each doctor performed was not an "IME", but, rather, a record review.

The court's second legal error was determining that I&I's search was adequate. Again, given the evidentiary record before the court, the court should have reconsidered its earlier ruling and reversed. CP 415-18. Instead, the court refused to consider I&I's so-called "search" (where it focused on only one search term and did not perform a search for records) under the standard given in Alliance, 172 Wn.2d at 719-25, regarding what constitutes an adequate search under the PRA.

It was a clear abuse of discretion for the court to agree with L&I that its search was adequate, and no records existed.

The court's third legal error was deciding that L&I had no duty to follow obvious leads when searching for records. Given the evidentiary record and argument before the trial court, the court should have reconsidered its earlier ruling and reversed. CP 418-19. Instead, the court refused to consider the adequate search standard of Alliance, and L&I's duty under the PRA to follow obvious leads. Alliance, 172 Wn.2d at 720 ("[A]gencies are required to make more than a perfunctory search and to follow obvious leads as they are uncovered.") (emphasis added). Likewise, "the agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested." Id.

It was a clear abuse of discretion for the court to agree with L&I that its "search" was adequate.

The court's fourth legal error was considering L&I's

supporting declarations as factually adequate to support its summary judgment motion. CP 419. Given the evidentiary record before the court and the factual deficiencies of I&I's declarations under the standard given in Alliance, 172 Wn.2d at 721 (factual information an affidavit should contain), it was an abuse of discretion for the court to consider the declarations of Chastain, Osborn, and Desch as sufficient to support L&I's claim of an adequate search in each request.

The fifth legal error was not considering the billing and payment records later-produced by L&I as responsive to Zellmer's three requests. Given the evidentiary record and argument before the court, the court should have reconsidered its earlier ruling and reversed. CP 419-20. Instead, it ignored the records, plainly responsive to Mr. Zellmer's request, as being the records he had requested. It was a clear abuse of discretion for the court to refuse to rule that L&I violated the PRA and withheld those records from Zellmer, and that he was the prevailing party in the action.

The sixth legal error made by the trial court was refusing to find equitable tolling applied to Request ID 112075. Given the evidentiary record and argument before the trial court, the court should have reconsidered its earlier ruling and reversed. CP 420. L&I did not perform any actual search for records, and deceptively told Mr. Zellmer that they did search for records and no records existed. It was a clear abuse of

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discretion for the court to refuse to apply equitable tolling to Zellmer's first request.

The court's seventh legal error was refusing to find that Zellmer was the prevailing party. Given the evidentiary record before the trial court, the court should have reconsidered and reversed. CP 420. L&I plainly possessed the responsive billing and payment records of each of the four doctors in the very amounts given by Zellmer. The records should have been produced "on request", and because they were not, makes Zellmer the prevailing party. Alliance, 172 Wn.2d at 726. It was a clear abuse of discretion for the court not to find L&I violated the PRA in each of Zellmer's three requests, and that Zellmer was the prevailing party and entitled to costs, fees, and penalties.

3. PLAINTIFF IS ENTITLED TO RECOVER HIS COSTS AND FEES ON APPEAL AS THE PREVAILING PARTY.

As the prevailing party under the Public Records Act on appellate review, RCW 42.56.550(4) entitles Mr. Zellmer to recover his "reasonable costs and fees incurred on appeal."

City of Fife v. Hicks, 186 Wn.App. 122, 147, 345 P.3d 1 (2015)

(citing Resident Council v. Hous. Authority, 177 Wn.2d 417, 447, 300 P.3d 376 (2013)). See also O'Neill, 183 Wn.App. at 25-26;

RAP 14.1 (appellate costs); RAP 18.1 (attorney fees).

It is to this extent that Mr. Zellmer respectfully requests this Court to award him all of his reasonable costs and fees incurred in this appeal as the prevailing party.

a. This Case Must Be Remanded To Determine The Question Of Penalties And Trial Court Costs.

As the "person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record," RCW 42.56.550(4), Mr. Zellmer has the right to "be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action." Id. To this extent, Mr. Zellmer requests this Court remand this case back to the superior court to (1) award Mr. Zellmer his costs and fees incurred in the superior court, and (2) determine the issue of bad faith and daily penalties to be assessed against L&I for its unlawful withholding of requested records.

Due to the fact that the trial court dismissed the action, no party had opportunity to properly brief the issue of bad faith. See RCW 42.56.565(1) (court must find agency acted in bad faith before incarcerated requestor can be awarded penalties against agency). While the parties have mentioned bad faith in passing, see CP 287, 319-20 (raising issue first time in reply brief), it was not raised in L&I's summary judgment motion. See CP 24 (Statement of Issues). Consequently, this case must be remanded back to the superior court to determine the issues of per diem penalties, and trial court costs and fees incurred in the action. PAWS, 125 Wn.2d at 271 (trial court may determine fees and costs both at the trial court and on appeal); King County v. Sheehan, 114 Wn.App. 325, 350, 57 P.3d 307 (2002)

(PRA's penalty provision grants authority only to trial court to set amount of penalty).

E. CONCLUSION

Based on the foregoing, Mr. Zellmer respectfully requests that this Court reverse the order of the trial court dismissing Zellmer's claims and remand for further proceedings, and award him his reasonable costs and fees incurred on appeal.

DATED this 18th day of August, 2019.

Respectfully sumitted,

7001 7011mar

Pro Se

CERTIFICATE OF SERVICE

(Pursuant to GR 3.1, RAP 18.5(e))

I, Joel Zellmer, certify (or declare) that on the date below I deposited the foregoing APPELLANT'S OPENING BRIEF, or a copy thereof, in the internal Legal Mail system of Washington State Penitentiary, 1313 N. 13th Avenue, Walla Walla, WA 99362 pursuant to GR 3.1, and made arrangements for postage, addressed to:

Clerk, Court of Appeals Division Two 950 Broadway, Suite 300 Tacoma, WA 98402-4454

Alexander Jourevlev, WSBA #44640 Attorney for Defendant 800 5th Ave., Suite 2000 Seattle, WA 98104-3188

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated at Walla Walla, Washington this 18th day of August, 2019.

Joel Zellmer

COURT OF APPEALS
DIVISION II

2019 AUG 22 PH 1: 00
STATE OF WASHINGTON
BY DEPORTY

August 18, 2019

Washington Court Of Appeals Division II 950 Broadway, Suite 300 Tacoma, WA. 98402-3636

RE: Joel Zellmer v. Department Of Labor & Industries No. 53627-7-II

1 m. 31h

Dear Clerk of Court,

Enclosed you will find the Appellant's Opening Brief to be fil ed with the court.

Thank You.

Sincerely,

Joel M. Zellmer #343003 Washington State Penitentiary

1313 N. 13th Avenue Walla Walla, WA 99362

Encls.



CLERK OF COURT OF APPEALS DIV II STATE OF WASHINGTON